

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**PROVIDENCE HEALTH AND SERVICES -
OREGON D/B/A PROVIDENCE PORTLAND
MEDICAL CENTER,**

EMPLOYER

and

Case 19-RC-231425

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 49**

PETITIONER

**HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS
AND RECOMMENDATIONS**

I. INTRODUCTION

This report contains my findings and recommendations regarding two determinative challenged ballots, pursuant to an the Regional Director of Region 19's Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections, dated January 17th, 2019.

Both ballots at issue were declared void by an agent of the National Labor Relations Board (Board). As set forth in more detail below, I recommend the Petitioner's challenge to one of the ballots be sustained, and the Employer's challenge to one of the ballots be sustained.

II. PROCEDURAL HISTORY

Pursuant to a petition filed on November 20, 2018, and a Stipulated Election Agreement, an election was conducted on December 12 and 13, 2018, to determine whether the following unit of employees of Providence Health & Services Oregon d/b/a Providence Portland Medical Center (Employer) wished to be represented for purposes of collective bargaining by Service Employees International Union Local 49 (Petitioner or Union):

All full-time, regular part-time and per diem non-professional employees employed by the Employer at its acute care hospital located at 4805 NE Glisan St., Portland, Oregon in the following classifications: Aide Perioperative 1, Aide Perioperative

Providence Portland Medical Center
19-RC-231425

2, Aide Rehab, Assoc Mental Hlth, Asst Food Svc 2, Asst Food Svcs, Asst Imaging Tech, Asst-Resource, Asst Sterile Processing, Attend Cleaning, Attend Cleaning Lead, Attend Housekeeping 2, Bed Control Coordinator, Buyer-Food, CNA 2, CNA 2 HUC, CNA 2 Med Surg, Cook, Cook Ld, Cook Prep Grill, Coord-Bed Placement, Coord-Food Svcs, Coord-Hlth Unit, Coord-Office, Coord-Pre Surg Info, Coord-Scheduler/Timekeeper, Coord-Scheduling, Coord-Scheduling LD, Coord-Specialty Scheduling, Coord-Staffing, Coord-Sterile Processing Svc, Diagnostic Imaging Support Specialist, Distributor Linen, Distributor Linen Ld, ED Support Spec, Ld-Food Nutrition, Medical Assistant Cert, Patient Escort, Patient Escort Ld, PBX Operator, Pharm-Tech/Tech-Med History Pharm, Phlebotomist, Phlebotomist 2, Qualified Mental Health Associate, Receptionist, Registrar, Scheduler-Diagnostic Imaging, Rep-Patient Relations, Scheduler-Diagnostic Imaging LD, Scheduler-Heart and Vascular, Spec-CV Scheduling, Spec-DI Support Lead, Spec-Floor Care, Spec-Mental Health, Spec-PT Dining, Spec-Surg Scheduling, Staffing/Unit Facilitator, Storekeeper-Nutrition Services, Tech Anesthesia Cert, Tech-1-Pharm Acute OC, Tech Anesthesia Ld, Tech Anesthesia Non Cert, Tech ECG/EKG, Tech ECG/EKG Senior, Tech Endoscopy, Tech ER, Tech Hemodialysis, Tech Monitor, Tech Monitor Ld, Tech Pharmacy, Tech-Pharm Inventory/Purchaser, Tech Sterile Processing 1, Tech Sterile Processing 2, Tech Videographer Equipment, Tech 1Pharm Acute, Tech 2 Pharm Acute and Tech 3 Pharm Acute; but excluding all other non-professional employees, Supply Chain Tech I, Coord-Pharm Pyxis, professional employees, physicians, registered nurses, technical employees, business office clerical employees, skilled maintenance employees, managerial employees and guards and supervisors as defined by the Act.

The tally of ballots prepared at the conclusion of the election on December 13 showed 374 votes cast for and 376 votes cast against the Union. There were 44 challenged ballots and 3 ballots declared void the Board Agent.¹

The parties filed numerous challenges and objections.² On January 30, 2019, the parties reached a stipulation that resolved all matters except for two of the challenged ballots the Board Agent had declared void.³ Pursuant to the stipulation, 15 previously-challenged ballots were

¹ The original tally is in the record as Petitioner's Exhibit 1.

² One of the employer's objections is in dispute, and is discussed and resolved below.

³ The Petitioner's objection that was not resolved by the stipulation was Objection 15. That objection states, "The Board Agent failed to follow procedure for processing questionably marked ballots by deeming three ballots void, failing to segregate two of the three ballots as challenged, and allowing one ballot to be voided even though there was an "X" or other unmistakable designation in one square and a slight mark in the other square." Aside from what is discussed herein, the Petitioner offered no evidence or argument that the Board Agent failed to follow proper procedures with regard to ballots he declared void. Any objection beyond that the Board Agent erred by declaring the ballots at issue void is unsupported and therefore overruled.

Providence Portland Medical Center
19-RC-231425

opened and counted on January 30. This resulted in a revised tally of ballots, with 383 votes cast for and 382 votes cast against representation by the Union.

Because the two remaining challenged ballots were potentially determinative, a hearing was held on January 31, 2019 in Portland, Oregon, before the undersigned, a duly designated hearing officer of the Board. The Employer and the Petitioner were represented by counsel during the hearing. All parties present at the hearing were afforded a full opportunity to be heard, to call and examine witnesses, and to introduce evidence on the issues to be considered.⁴ The Employer and the Petitioner timely submitted briefs summarizing their positions on the issues.

III. THRESHOLD PROCEDURAL ISSUE

Before analyzing the substantive issues with regard to the challenged ballots, I must resolve the procedural matter of whether the Employer timely objected to the ballot it seeks to challenge.

On January 30, 2019, prior to the hearing, the Regional Director, per his designee, permitted the Employer to amend its objections to include Employer's objection 12:

Without waiving any argument that it was not required to file, or that it has properly amended its Objections, the Employer objects to the consideration of a ballot the Board Agent initially and properly declared void. The Board Agent appropriately determined that the ballot was void because the voter's intent was unclear under the Board's established policy and case law.

At the hearing, I permitted the amended objection to proceed to the merits. (Tr. 12.)⁵

Prior to the amendment, the Employer had expressed intent to object to consideration of the void ballot as shown on the challenged ballot envelope. On that envelope, the Board Agent documented that the Petitioner believed the ballot was valid, and the Employer believed it was invalid. (Er. Exh. 1.) The Board Agent placed the ballots that had been declared void in the challenged ballot envelope.

On December 20, 2018, the Employer submitted a position statement to the Board. The Employer's position on the ballots declared void states:

⁴ Neither party opted to call witnesses.

⁵ The following abbreviations apply: "Tr." stands for "Transcript"; "Er. Exh." stands for "Employer Exhibit" "Bd. Exh." stands for "Board Exhibit." Though I have cited to specific portions of the record, I emphasize that this recommendation is based on my consideration of the entire record.

Providence Portland Medical Center
19-RC-231425

The Board Agent declared three ballots “void.” PPMC’s position is that one of those ballots —which clearly and unequivocally shows the voter's intent, but had meaningless, random marks on the reverse side of the ballot — should have been counted.

PPMC agrees with the Board Agent's determination that the other two ballots were “void” because the voter's intent was not clear.⁶

(Er. Exh. 2.) The Employer’s objections filed that same day, numbered 1-4 and 7-11, did not reference the void ballots at issue.

At the hearing, I instructed the parties to submit argument regarding their respective positions in their closing briefs. (Tr. 12.)⁷ The Union asserts that, under the Board’s rules, the Employer’s objections were untimely. Specifically, Section under Section 102.60(a), objections must be filed within seven days of the tally of ballots. The Employer asserts that the ballot was challenged by the Board Agent, the Employer timely registered its objection to counting this ballot at the tally of ballots as shown by the challenged ballot envelope, and its position statement included its objections to the void ballots. Under the facts of this case, I agree that the Employer registered its objections in a timely manner, the amendment was properly granted and served to align form with substance, there has been no prejudice to the Union, and the matter has been fully and fairly litigated.

IV. THE CHALLENGED BALLOTS

A. Facts

As noted above, the relevant facts stem from two challenged ballots the Board Agent had declared void following the initial tally of ballots.⁸ The ballots’ instructions state, in pertinent part:

Do you wish to be represented for purposes of collective bargaining by
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 49?
MARK AN "X" IN THE SQUARE OF YOUR CHOICE

⁶ As detailed in footnote 7, the parties ultimately agreed that one of these ballots was void.

⁷ The transcript erroneously uses the word “debrief” instead of “brief” at p. 12, line 16. As intriguing as it may have been, I can say with certainty I never contemplated a debriefing with the parties after the hearing.

⁸ A third ballot the Board Agent had declared void had a clear X in both the “yes” and “no” boxes, and the parties agreed it was void in the January 30, 2019 stipulation.

Providence Portland Medical Center
19-RC-231425

(Bd. Exhs. 2, 3). Beneath these instructions are two boxes, side-by-side, the left-hand side box labeled “YES” and the right-hand side box labeled “NO”.

The first challenged ballot, which will be referred to as “Ballot 1” herein, contains an X in the “yes” box and a smudged diagonal line in the “no” box. (Bd. Exh. 2.) The second challenged ballot, which will be referred to as “Ballot 2” herein, contains an X in the “no” box, along with other markings in the shape of ovals in the “no” box, no markings in the “yes” box, and scribbling on the back of the ballot. (Bd. Exh. 3.)

B. General Legal Principles

In representation elections, the Board’s primary goal is to protect the right of individual employees to choose whether or not to be represented by a union. *General Shoe Corp.*, 77 NLRB 124, 127 (1948), *enfd.* 192 F.2d 504 (6th Cir. 1951), *cert. denied* 343 U.S. 904 (1952). To effectuate that goal, the Board adheres to the following principles:

- The Board assumes, that by casting a ballot, the voter intended to participate in the election process and to register a preference;
- This preference must be given effect whenever possible; but
- The Board avoids speculation or inferences regarding the meaning of atypical “X”s, stray marks, or physical alterations

See *Daimler-Chrysler*, 338 NLRB 982, 982-983 (2003), and cases cited therein.

The Board will “count irregularly marked ballots whenever the intent of the voter is clearly apparent.” *Hydro Conduit Corp.*, 260 NLRB 1352, 1352 (1982); See also *Brooks Brothers, Inc.*, 316 NLRB 176 (1995) (Board “will count a ballot where, despite an irregularity in the manner in which it has been marked, it clearly expresses the voter’s intent.”)

By contrast, when a voter “marks both boxes on a ballot and the voter’s intent cannot be ascertained from other markings on the ballot (such as an attempt to erase or obliterate one mark), the ballot is void because it fails to disclose the clear intent of the voter.” *TCI West, Inc.*, 322 NLRB 928 (1997), *enf. denied*, 145 F.3d 1113 (9th Cir. 1998); See also *Caribe Industrial & Electrical Supply*, 216 NLRB 168 (1975); *Bishop Mugavero Center*, 322 NLRB 209 (1996).

Providence Portland Medical Center
19-RC-231425

C. Ballot 1

Ballot 1 contains an X in the “yes” box and a smudged diagonal line in the “no” box. The Petitioner argues that Ballot 1 conveys a “yes” vote. The Employer argues that it is void. I find the voter’s intent is clear from the ballot, and that the voter intended to vote “yes” for the Union. The single diagonal line in the “no” box has smudge marks consistent with an attempt at erasure, while the X in the “yes” box is clear and unambiguous.

Board caselaw is consistent that, when there is a clear marking in one box, and an attempt at erasure in the other, the voter intended to vote in accordance with the clear marking. For example, in *J.L. P. Vending Co.*, 218 NLRB No. 119 (1975), the ballot at issue was marked with a single diagonal line in the “no” box and several diagonal lines superimposed on each other in the “yes” box. Like here, the record showed there was an attempt to erase the single diagonal line. The Board held that by attempting to erase the single diagonal line in the “no” box, while making clear marks in the “yes” box, the voter showed an intent to vote for the union. See also *Osram Sylvania, Inc.*, 325 NLRB No. 147 (1998), (smudge mark on a diagonal line in the “yes” box indicated an attempted erasure, where the “no” box was marked with X and there were additional X markings in the “no” section of the ballot).

Even where there are X marks in both boxes, the Board will give effect to the ballot where the voter’s intent is clear. For example, in *Abtex Beverage Corp.*, 237 NLRB 1271(1978), the voter placed an X in both the “yes” and “no” boxes, but scratched over the X in the “no” box with circular markings. Noting the ballot was marked with a pen and could not likely be erased, the Board found that the voter intended to vote for union representation. In *Mediplex of Conn., Inc.*, 319 NLRB 281 (1995), the ballot at issue had smudged X in one box and a clear X in another. The Board adopted the administrative law judge’s finding that ballot at issue clearly expressed the voter's intent to vote “no” because the X in the “no” box was heavy and clear, while the X in the “yes” box was lightly marked and was “covered by the kind of smudges caused by an inadequate eraser.”⁹ In *Brooks Brothers*, *supra*, the voter marked an X in both

⁹ Though the Board’s decision, other than affirming the administrative law judge, does not discuss the double-marked ballot, the Board has cited to *Mediplex* as precedent on this point. See, e.g., *Osram Sylvania, Inc.*, *supra*.

Providence Portland Medical Center
19-RC-231425

boxes, but scratched over the X in the “yes” box with pencil markings. The Board found that this clearly expressed the voter’s intent to vote against the union.

The Employer cites to *TCI West*, supra, to support its contention that Ballot 1 is spoiled and therefore void. Like the instant case, the voter in *TCI West* had marked one box with an X and another with a single diagonal line. In that case, however, there was no evidence of an attempt to erase the diagonal line; in this case such an attempt is clear and creates a material distinction. The same holds true for *Bishop Mugavero Center* and *Carbie Industrial*, supra.

The Employer further argues that the Board’s decision *Mercy College*, 212 NLRB 925, 926 (1974), applies, and dictates a different result.¹⁰ In that case, the ballot displayed a clear X in the “yes” square and a heavily shaded-over X in the “no” square. Here, however, there is not an X in both squares. Instead, there is a clear X in the “yes” square, and a smudged-over single diagonal slash in the “no” square. The only reasonable interpretation is that the smudged-over slash is an attempt at erasure. The voter obviously knew how to make a clear X, as the instructions directed, and did so convincingly in the “yes” box.¹¹

Based on the foregoing, because Ballot 1 shows the voter intended to vote for the Union, I sustain the Petitioner’s objection, find it is not void, and therefore it should be counted as a “yes” vote in favor of the Union.

D. Ballot 2

Ballot 2 contains an X in the “no” box, along with other markings in the shape of ovals in the “no” box, no markings in the “yes” box, and scribbling on the back of the ballot. The Employer asserts that the ballot conveys a “no” vote, as only the “no” box has markings, and the scribbles on the back of the ballot are not an identifying mark. The Petitioner argues this ballot is void because the irregular markings in and around the “no” box can reasonably be interpreted as an attempt to obliterate a diagonal mark in the “no” box. The Petitioner further argues that the back of the ballot contains an illegible signature, which is an identifying mark. I agree with the Employer, and find ballot 2 shows a clear intent to vote against union representation.

¹⁰ The Board cases relied on to support my decision post-date *Mercy College*, demonstrating the reaches of that decision as well as the fact-intensive inquiry required in each case.

¹¹ See *J.L. P. Vending*, supra, distinguishing *Mercy College* under circumstances similar to those present here.

Providence Portland Medical Center
19-RC-231425

First, the only markings on the front of the ballot are in the “no” section. These markings are a fainter line and a fainter scribble in an oval shape as well as a darker scribble in an oval shape diagonally from bottom to top and couple of darker diagonal lines from top to bottom. The difference in shade along with the nature of the scribbles conveys a writing instrument that was initially only making faint marks until the writer scribbled to get it working better.

Significantly, there are no markings on the front of the ballot that are completely outside the “no” box and there are no markings whatsoever on the “yes” side of the ballot. In *Kaufman’s Bakery*, 264 NLRB 225 (1982), the Board stated, “In keeping with the Board’s long-established policy of attempting to give effect to voter intent whenever possible, we will hereafter regard a mark in only one box, despite some irregularity, as presumptively a clear indication of the intent of the voter.” In that case, two ballots were marked with Xs along with some additional markings in the “yes” boxes, but there were no markings in the “no” boxes. The Board found that the irregularly-marked ballots demonstrated with reasonable certainty that the employees intended to vote for the Union. Similarly, the Board majority in *Daimler-Chrysler*, supra, found an intent to vote for the union where the voter placed an X in the “yes” square, but also placed a question mark next to the “yes” box.

The Union cites to *Hanson Cold Storage Co., v. NLRB*, 860 F.3d 911 (7th Cir. 2017), a case in which the Court of Appeals for the Seventh Circuit declined to apply the *Kaufman’s Bakery* presumption. In *Hanson Cold Storage*, the “yes” side of the ballot was marked with a large X, the center of which was in the upper left portion of the “yes” box and portions of which were both inside and outside of the “yes” box, as well as indecipherable scribbles both inside and outside of the box.¹² Even if Seventh Circuit’s caselaw, rather than Board caselaw, governed this analysis, the markings in *Hanson Cold Storage* are plainly more erratic than those present here, with many extending well into the instruction portion of the ballot, and they do not show the inconsistent shading present here. In any event, under extant Board law, I find Ballot 2 indicates the voter’s intent to vote against union representation.

Finally, the Union’s argument that the scribbles on the back of Ballot 2 contain an identifying mark is unconvincing. Ballots that are signed or may otherwise reveal the voter’s

¹² The ballot at issue is contained in the body of the Court’s decision and I viewed it by accessing the decision on Westlaw.

Providence Portland Medical Center
19-RC-231425

identity are invalid. See *Ebco Mfg., Co.*, 88 NLRB 983, 985 (1950)(ballot marked with a circled letter “R” invalid); *Standard-Coosa-Thatcher Company*, 115 NLRB 1790 (1956)(ballot marked with clear number “417” , which coincided with a clock number the employer had assigned to an employee, invalid). Here, the ballot is not signed, nor can any reasonable reading of it decipher the voter’s identity. The Union argues that the voter made a deliberate signature, as shown by the “swooping letter” starting at the left side. Even upon intense scrutiny, I was unable to identify a single letter on Ballot 2. Put simply, it is indecipherable scribble.

Consistent with *Kaufman’s Motors* and *Daimler-Chrysler*, I find that Ballot 2 shows the voter’s intent to vote against union representation. The long oval portions of the markings, all of which are on the “no” side and are at least partially inside the “no” box, are scribbles highly consistent with an attempt to get a writing instrument to work, and the scribbling on the back of the ballot is meaningless. Accordingly, Ballot 2 should be counted as a “no” vote, against representation by the Union.

V. CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, I recommend that Ballot 1 be counted as a “yes” vote in favor of representation by the Union, and that Ballot 2 be counted as a “no” vote against representation by the Union. This brings the tally of ballots to 384 cast for the Union and 383 cast against the Union. Accordingly, I recommend that an appropriate certification issue.

Appeal Procedure:

Pursuant to Section 102.69(c)(1)(iii) of the Board’s Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 19 by **Thursday, March 7, 2019**. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency’s website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be

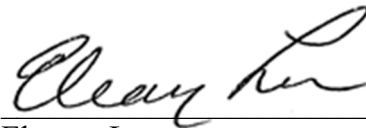
Providence Portland Medical Center
19-RC-231425

addressed to the Regional Director, National Labor Relations Board, 915 Second Avenue, Suite 2948, Seattle, Washington 98174.

Exceptions and any supporting brief must be received by the Regional Director by 4:45 PM on the due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

DATED at Washington, D.C. 21ST day of February 2019

A handwritten signature in black ink, appearing to read "Eleanor Laws", is written over a horizontal line.

Eleanor Laws
Administrative Law Judge